KRISHNAN RAMAR

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
WAN HAMZAH SCJ
[CRIMINAL APPEAL NO. 42 OF 1984]
3 OCTOBER 1986

CRIMINAL LAW AND PROCEDURE: *Dangerous drugs - Trafficking - Dangerous Drugs Act 1952 - Two charges - 1st charge - Section 39B(1)(a), 39B(2) - 2nd charge - Section 6B(1)(a), 6B(3) - 2nd charge stayed - Death sentence on 1st charge - Appeal - Cautioned statement - Whether admissible - Evidence improperly admitted discarded - Whether there is sufficient left to justify conviction - Conviction quashed - Whether there should be a retrial.*

EVIDENCE: *Cautioned statement - Whether admissible.*

The appellant was charged in the High Court for trafficking in dangerous drugs. He faced two charges, the first under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"), an offence punishable under s. 39B(2) for trafficking in 292.90 grammes of cannabis. The 2nd charge was that he did cultivate four cannabis plants from which raw cannabis might be obtained directly without the authorisation of the relevant Minister in contravention of s. 6B(1)(a) of the Act and punishable under s. 6B(3).

The officer who was investigating officer and who led the raid in which appellant was arrested then testified. At the close of his testimony the learned Deputy, for reasons not disclosed, applied to have the 2nd charge stayed. There was no objection from the defence Counsel and proceedings then continued on the 1st charge only on which the appellant was subsequently found guilty and convicted, whereupon on the application of the learned Deputy the 2nd charge was withdrawn and the appellant discharged on the 2nd charge.

From the staying of the 2nd charge arose the first main ground of appeal. Counsel for the appellant contended that evidence of cultivation of ganja was inadmissible, irrelevant and prejudicial and that this had occasioned a miscarriage of justice. He also objected to the reference in the judgment that the appellant was an addict.

Held:

[1] Regarding the cautioned statement, no cautionary admonition was administered, and this was not an instance where the statement complained of was blurted out before there was time to administer the caution. The cautioned statement was therefore inadmissible.

[2] Added to the uncertainty in that portion of the learned trial Judge's judgment which foreshadowed what he might have done had the cautioned statement alone been excluded, the other item of evidence wrongly admitted under s. 27 of the Evidence Act, the likely result, in their Lordships' mind, would have been that the defence would never have been called.

[3] It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot

be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

[4] After careful consideration their Lordships ruled that the proper course would be to quash the conviction and set aside the sentence.

[5] Their Lordships considered and rejected ordering a retrial since it would be most unjust in the circumstances to put the appellant in jeopardy of his life twice.

[Appellant acquitted and discharged.]

Cases referred to:
Poon Soh Har v. PP [1972] 2 MLJ 126
Makin v. The A.G. for New South Wales [1894] AC 57
Tan Hung Song v. Rex [1951] MLJ 181
Pulukuri Kottaya v. King Emperor LR 74 Ind App 65

Legislation referred to:
Criminal Procedure Code, s. 113(1), (a)(ii)

For the appellant - S. Ramasamy; M/s. Ramasamy Suppiah & Co.
For the respondent - Gooi Soon Seng, DPP

JUDGMENT

Wan Suleiman SCJ:

The appellant faced two charges in the Court below, the first charge being

> That you on 3 November 1983 at about 3.20 p.m., at house No. 13H, 10th Milestone, Kepis, Dangi, in the District of Kuala Pilah, in the State of Negeri Sembilan, on your own behalf, did traffic in a dangerous drug, to wit, cannabis weighing 292.90 grammes, in contravention of the provisions of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Law of Malaysia act 234), and thereby committed an offence punishable under s. 39B(2) of the said Act.

and the second

> That you on 3 November 1983 at about 3.20 p.m., behind your house at 10th Milestone, Kepis, Dangi, in the District of Kuala Pilah, in the State of Negeri Sembilan, on your own behalf, did cultivate four cannabis plants from which raw cannabis may be obtained directly without the authorisation of the Minister charged with the responsibility for Medical and Health services in contravention of the provisions of s. 6B(1)(a) of the Dangerous Drugs Act 1952 and thereby committed an offence punishable under s. 6B(3) of the said Act.

The officer who was Investigating Officer and who led the raid in which appellant was arrested then testified. At the close of his testimony the learned Deputy, for reasons not disclosed applied to have the 2nd charge stayed. There was no objection from the defence Counsel and proceedings then continued on the first charge only on which appellant was subsequently found guilty and convicted, whereupon on the application of the learned Deputy the second charge was withdrawn and the appellant discharged on the second charge.

From the staying of the second charge arose the first main ground of appeal.

Mr. Suppiah for the appellant contends that evidence of cultivation of ganja, is inadmissible, irrelevant and prejudicial and that this has occasioned a miscarriage of justice.

He also objected to the reference in the judgment that appellant was an addict. Whilst it would be inaccurate to suggest that there was no evidence to that effect, but the only mention of it was made in the cautioned statement of which we will have more to say about in due course.

A passage in the Investigating Officer's testimony at p. 10 of the Appeal Record was specified by Mr. Suppiah. This relates to what the appellant had done and said in response to the Investigating Officer's questions after ganja, the subject of the first charge, had been found in one of the two houses, allegedly occupied by him and his family:

> I asked Krishnan whether he had any more ganja. He said yes and by pointing to the back of the house. I asked him if he could take me to the place. He said he could. Then be brought me to a small plantation. I asked him where was the thing and he answered, that it was there, by pointing to the plants of ganja, planted between vegetables. I asked him if he had anymore. He did not say anything but he pointed to the direction of one container suspected of containing seedlings of the ganja. Then, beside the container, I found seeds suspected to be seeds of ganja.

We should perhaps mention that these questions and answers were made without any caution being administered under s. 113(1) of the Criminal Procedure Code, nor was any caution administered soon after the statement had been made under the circumstances envisaged under proviso (b) to that subsection.

Whilst such evidence may well be admissible under s. 27 of the Evidence Act on the second charge, it would without question be inadmissible where only the first charge is proceeded with.

As one would expect, the cautioned statement, recorded with both charges in mind contained reference to the same objectionable items, and not surprisingly the judgment took into account such evidence (see pp. 90/91 and p. 98).

We were referred to the decision in *Poon Soh Har v. PP* [1972] 2 MLJ 126 which relied on the *locus classicus* on this point the Privy Council decision in *Makin v. The A.G. for New South Wales* [1894] AC 57 in which it was held that it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. Their Lordships went on to say that the mere fact that the evidence adduced tends to show the commission of other crimes do not render it inadmissible if it is relevant to an issue before a jury, and it may be relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment is designed or accidental, or to rebut a defence which would otherwise be open to the accused.

We need hardly say that the same principle should apply where the Judge was as in this case, sitting alone, and we have not lost sight of the words of caution that whilst the principles are easy to state it is often difficult to draw the line and decide whether a particular item of evidence is on the one side or the other.

There is no question that the evidence complained of was to negative any defence that the offence of possession of dangerous drugs was designed or accidental. It might appear from the reply of the learned Deputy that the Public Prosecutor's consent being for the first charge

only, application had therefore been made to stay the second charge so that evidence of events relevant to the second charge (which had been stayed) had been introduced inadvertently, and to compound this act of negligence, the same evidence was introduced a second time in the cautioned statement made by the appellant. Whether the evidence complained of had been intentionally introduced must be a matter for conjecture.

The learned Deputy in his reply to Mr. Suppiah conceded that since consent for the prosecution by the Public Prosecutor had been given only in respect of the first charge, he had asked for the stay of the second. Incidentally, no consent is needed for a prosecution of an offence under s. 6B(1)(a) of the Act, the section on which the second charge was based.

However not only was evidence of crucial admissions to the Investigating Officer by the appellant, pertinent to the charge which was stayed introduced and admitted in evidence, but admissions relating to the offence therein alleged were allowed to remain in the cautioned statement made by appellant, which the learned trial Judge admitted in evidence.

It would therefore be fair to proceed on the assumption that such evidence had been intentionally introduced by the prosecution bearing in mind that, as Counsel for appellant indicated, the stay had been applied for and granted **after** the objectionable evidence had been adduced.

There are other disturbing factors about such evidence, unfortunately not taken up before us but which is incumbent upon us to consider.

Firstly it will be useful to set out in extenso that part of appellant's statement as related by the Investigating Officer (at p. 10/11 of the Record):

> On arrival, I saw one male Indian standing in front of the house. When he saw me, he ran into the house. I gave chase into the house and introduced myself as a police officer. I went to the house, because I received information in respect of dadah. I chased him, he was behaving suspiciously. After introducing myself, I asked for his identity card and found his name to be Krishnan s/o Ramar (accused is identified as the person). I informed him that I wanted to search his house. I then started searching the house. The bed room in the rear, under a wooden platform, I found 237 packets of suspected ganja. After that I directed photographer to take photographs of the place i.e., the spot where the suspected ganja was recovered. I asked Krishnan whether he had any more ganja. He said yes and by pointing to the back of the house. I asked him if he could take me to the place. He said he could. Then he brought me to a small plantation. I asked him where was the thing and he answered, that it was there, by pointing to the plants of ganja, planted between vegetables. I asked him if he had any more. He did not say anything but he pointed to the direction of one container suspected of containing seedlings of the ganja. Then, beside the container, I found seeds suspected to be seeds of ganja. When he pointed to me the plants of ganja, I directed photographer to take photographs. When the accused pointed to the container, I also directed the photographer to take photographs of the seedlings found. After that I directed the photographer to take photograph of the ganja plants. The container containing seedlings and also the said seeds. I arrested the accused and with the things found I brought to the pondok polis at Kepis.

We are satisfied that the arrest had taken place earlier, when that witness had pursued appellant into his house and asked to search it. That brings the requirement of s. 113(1)(a)(ii) of the Criminal Procedure Code, which requires the administration of the cautionary words before his statement would become admissible, into play.

No such cautionary admonition was administered, and this is not an instance where the statement complained of was blurted out before there was time to administer the caution. The cautioned statement is therefore inadmissible.

A second hurdle, in our view would be s. 27 of the Evidence Act, which for ease of reference, is set out hereunder:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of the police, so much of such information, whether such information amounts to a confession or not, as relates to the facts thereby discovered, may be proved.

As was said in *Tan Hung Song v. Rex* [1951] MLJ 181, it allows so much of the information as distinctly relates to the facts discovered to be admissible in evidence.

Section 27 of the Evidence Act is not intended to let in a confession generally and not one word more of the information which the accused supplied should be given in evidence than is strictly necessary to show how the fact which was discovered is connected with the accused so as in itself to be a relevant fact against him.

That inadmissible and highly prejudicial evidence was let in which would have been inadmissible and prejudicial even had the second charge (for cultivation) been proceeded with is abundantly clear from the evidence of the Investigating Officer which has been set out earlier.

The passage in the Privy Council decision in *Pulukuri Kottaya v. King Emperor* LR 74 Ind App 65 cited in *Tan Hung Song* amply illustrates the danger of letting in too much under s. 27 of the Evidence Act:

> Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

Therefore we have here a situation where evidence have been admitted which should not have been admitted and the duty of this Court in such circumstances is set out in s. 167 of the Evidence Act which reads as follows:

> 167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the Court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought to have varied the decision.

After discarding the evidence improperly admitted, is there sufficient left to justify the conviction?

We would refer to that portion of the learned trial Judge's judgment which foreshadowed what he might have done had the cautioned statement alone been excluded:

> I ought to mention also that had the cautioned statement of the accused in this case been excluded from the evidence, the evidence without the cautioned statement might or might not possibly have led to a benefit of doubt being accorded to the accused, but it was not necessary to decide such a hypothetical position as the Court was of the view also that only some evidence of material circumstances extraneous to the cautioned statement would be sufficient for the purpose of corroborating the confession contained in the cautioned statement, and that such corroborative evidence so used, need not, by itself, have inevitably established a case beyond a reasonable doubt against the accused or otherwise justified a conviction. Please see

again the case of *R. v. Baskerville* (*supra*). Were it otherwise, the cautioned statement would of course have been supererogatory for the purpose of the conviction in this case. If such evidence, minus the cautioned statement was by itself sufficient to justify such a conviction, then such evidence together with the cautioned statement would have the effect of making this case even more formidable or unassailable.

Add to such uncertainty the other item of evidence wrongly admitted under s. 27 of the Evidence Act, the likely result, in our mind, would have been that the defence would never have been called.

It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

After careful consideration we rule that the proper course would be to quash the conviction and set aside the sentence.

We have considered and rejected ordering a retrial since it would be most unjust in the circumstances to put him in jeopardy of his life twice.

The appellant is accordingly acquitted and discharged.

Also found at [1987] 1 CLJ 28